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No. 79-5180

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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ROGER DALE THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

After reviewing this case in light of the Department of Justice "Petite" policy against dual state and federal prosecutions for substantially the same conduct, we are requesting that the Court vacate petitioner's conviction for violating the federal gun laws.

1. Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to two years' imprisonment, to be served consecutively to a previously imposed state sentence based on the same incident that gave rise to this prosecution. The court of appeals summarily affirmed (Pet. App. 11-12).

In the early morning hours of August 3, 1977, police officers in Owingsville, Kentucky apprehended petitioner and his brother in the back rooms of a pharmacy into which they had unlawfully entered. The policemen took petitioner and his brother to the police station and charged them with burglary. Approximately 20 minutes later, the officers, now accompanied by the pharmacy owner, returned to the pharmacy where they found a semi-automatic pistol on the shelf next to the spot where petitioner had been arrested. The gun did not belong to the owner and had not been on the shelves at the close of business on August 2, 1977. When the police and the owner returned to the station with the weapon, petitioner was overheard telling his brother that "they found that gun." In addition, the evidence at trial showed that the gun had at one time traveled in interstate commerce and that petitioner had previously been convicted of a felony for making and possessing an unregistered sawed-off shotgun (Pet. App. 11; Tr. 115, 139-141, 187-197, 227, 247-251, 267-270, 279-280, 321-322).

Prior to petitioner's federal conviction, state authorities had prosecuted petitioner for armed (second degree) burglary, in violation of Ky. Rev. Stat. Ann. § 511.030 (1972). On March 6, 1978, a jury sitting in the Bath County (Kentucky) Circuit Court, convicted petitioner of the lesser included offense of unarmed (third degree) burglary, in violation of Ky. Rev. Stat. Ann. § 511.040 (1972). Petitioner received a two-year sentence of imprisonment for his state conviction.

2. The court of appeals correctly concluded that the federal prosecution that occurred in this case did not offend double jeopardy principles (Pet. App. 11). See, e.g., Abbate v. United States, 359 U.S. 187 (1959). However, the Department of

Justice adheres to a long-established policy of declining to prosecute individuals for acts forming the basis of a state conviction "except when necessary to advance compelling interests of federal law enforcement." Rinaldi v. United States, 434 U.S. 22, 28 (1977); see, e.g., Petite v. United States, 361 U.S. 529, 530 (1960). Here, no Petite waiver was obtained, and after careful review, we have concluded that petitioner's prosecution for unlawfully possessing a firearm was not supported by an independent compelling federal interest not satisfied by the state prosecution for armed burglary. Accordingly, no nunc pro tunc Petite waiver authorization is warranted. See, e.g., Rinaldi v. United States, supra; Watts v. United States, 422 U.S. 1032 (1975); Ackerson v. United States, 419 U.S. 1099.

We therefore request the Court to permit the effectuation of the government's policy against successive prosecutions by granting the petition, vacating the judgment of the court of appeals, and remanding the case to the district court with instructions to grant the government's motion to dismiss the indictment. 1/

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

OCTOBER 1979

1/ In view of the relief we have requested, it is unnecessary for the Court to consider petitioner's additional contentions, which are, in any event, insubstantial.